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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEABOARD SYSTEM RAILROAD, INC.
Petitioner,

v.

BROTHERHOOD OF RAILROAD SIGNALMEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A Public Law Board ordered back pay and reinstatement in a labor arbitration involving a Railroad employee. The employer then learned that the employee had filed a sworn application for and was receiving physical disability benefits. The Public Law Board concluded it lacked jurisdiction to determine the impact of the employee's disability upon the back pay Award. The District Court and Court of Appeals ordered the Award enforced. The District Court then calculated and entered a monetary Award against the Railroad. The Court of Appeals affirmed.

(1) May a dismissed Railroad employee enforce a claim for back pay when the employee also claimed and received physical disability payments for all time off work based upon his sworn application to the Railroad Retirement Board and the arbitrator did not consider the effect on the award?

(2) Did the Court below err in applying the doctrine of the law of the case in refusing to consider the issue of monetary relief in the second appeal where the District Court, after the first appeal and for the first time, awarded monetary relief?

PARTIES BELOW

In addition to the parties shown in the caption of the case, the Respondent represents Mr. George L. Choate.

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BROTHERHOOD OF RAILROAD SIGNALMEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner ("Railroad") requests certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.[1] The list of all parent, subsidiary, and affiliated companies as required by Sup. Ct. R. 28.1 appears as Appendix H.

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[1]Petitioner is the successor by merger of Louisville and Nashville Railroad Company, the appellant below, and Seaboard Coast Line Railroad Company.

OPINIONS BELOW

The more recent opinion of the United States Court of Appeals for the Seventh Circuit is unpublished and appears as Appendix A.[2] The unreported judgment of the District Court appears as Appendix B.[3] The earlier opinion of the United States Court of Appeals for the Seventh Circuit, including the earlier District Court judgement, is reported at 688 F. 2d 535, and appears as Appendix C.

JURISDICTION

The more recent Court of Appeals decision was filed on August 23, 1984. Pet. App. 1a. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied on September 21, 1984 by an order that appears as Appendix D. The jurisdiction of this Court is involved under 28 U.S.C. Section 1254 (1).

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[2]It is an "unpublished Order not to be cited per Circuit Rule 35."

[3]The judgment was later modified on an issue of interest.

STATUTE INVOLVED

Section 3 First (p), 45 U.S.C. § 153 First (p) and Section 3 Second, 45 U.S.C. § 153 Second of the Railway Labor Act appear in Appendix E.

STATEMENT OF FACTS

The case is of ongoing importance because enforcement of the judgments would expand the judicial review role of the federal courts in railroad arbitration awards contrary to the prior mandates of this Court, the Court below in prior decisions and the holdings of the Courts of Appeals of other circuits.

I. Events Prior to the Proceedings Below

A. George Choate's Dismissal by the Railroad

George Choate was employed as a system signal tester helper by the Railroad until a discipline hearing was held on July 16, 1976, and he was suspended for absenteeism without authorization. Thereafter, he was discharged on August 10, 1976.

B. The Union's Response to Choate's Dismissal

The Respondent, Brotherhood of Railroad Signalmen ("Union"), appealed Choate's claim for reinstatement to a Public Law Board pursuant to the Railway Labor Act. Pet. App. 39a.

C. Choate's Physical Disability from Railroading

Unknown to the Railroad, following his dismissal in 1976, Choate made sworn application for sickness benefits with the Railroad Retirement Board and these payments commenced retroactive to July 16, 1976. Later, in 1978, and

unknown to the Railroad, Choate filed a sworn application for a disability annuity from the Railroad Retirement Board and his annuity was awarded.

D. The Board Award

The appeal of Choate's dismissal resulted in a finding by the Board in 1978 that it was "impossible" for it to "determine whether or not Claimant's [Choate's] action justified discipline" and a two word Award followed: "Claim Sustained." Public Law Board No. 1998, Award No. 1 appears as Appendix F.

E. The Board's Interpretation of Its Award

At this juncture, the Railroad first learned that Choate was claiming to be physically disabled and receiving disability payments from the Railroad Retirement Board for all the time he had been dismissed from the service of the Railroad. This discovery caused the Railroad to contend that Choate should not be paid any back pay for the time he swore he could not work. The Union sought the Board's interpretation as provided by the Railway Labor Act. See 45 U.S.C. § 153 First (m).

However, in the words of dissenting Judge Posner in the earlier opinion of the Court below, "The Board issued an interpretation that did not interpret." Pet. App. 29a. The interpretation of Public Law Board No. 1998, Award No.1 appears as Appendix G.

On the issue of Choate's disability, the Board considered it to be a question of compliance and stated:

> "Compliance with an Award and Order of a Public Law Board, such as this, is not within the jurisdiction of such Board but rather rests in the Courts. For this reason, which is beyond question, most of the issues raised by Petitioner cannot be considered by this Board . . .

It should be noted that the status of Claimant during the handling of this claim on the property is not a part of the basic record in this case; the issue of his status was not joined during the handling of the dispute on the property." Pet. App. 46a.

The Board refused to consider whether Choate's physical disability negated his right to any back pay, nor did the Board order any specific back pay. Instead, the Board ordered full compliance with Rule 55 of the collective bargaining agreement rule requiring pay "for time lost."[4]

II. The Proceedings Below

A. The Union's Suit to Enforce the Award

The Union sued the Railroad to enforce the award and moved for summary judgment on December 15, 1979 seeking reinstatement and all lost wages. The Railroad's defense in its cross-motion for summary judgment relied upon the admitted genuine application for disability annuity filed by Choate with the Railroad Retirement Board in which he had sworn he had been disabled from his position as a systems signal tester helper since July 16, 1976. Thereafter, the District Court, on April 22, 1981, granted the Union's motion ordering the Railroad to "comply with Award No. 1, Case No. 1 of Public Law Board No. 1998. . . " Pet. App. 26a.

B. The Railroad's First Appeal

The Railroad contended the suit was unnecessary since full compliance with the Award had already been achieved because:

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[4]Rule 55 of the Union agreement reads:

"If the charge or charges against an employee are not sustained, his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost."

(1) Choate had been reinstated on the seniority roster.

(2) Choate's personal record had been expunged of the discipline charge.

(3) Choate was still receiving his disability annuity from the Railroad Retirement Board.

(4) Choate had refused the Railroad's offer to be reinstated to his regular position.

(5) Choate had been requesting leaves of absence from his system signal tester helper position, but was informed these requests were rendered unnecessary because he was receiving sickness and disability benefits.

Nothwithstanding, the United States Court of Appeals for the Seventh Circuit in its initial decision affirmed the District Court in a divided opinion. Pet. App. 14a. The Court recognized the scope of judicial review of such awards "is among the narrowest in the law." Then the Court appreciated the Railroad's dismay:

> "We find it anomalous that an employee can claim to be permanently and totally disabled, obtain a certification to that effect, and collect sickness and disability payments, and, at the same time, seek to force his employer to reinstate him to his former position with pay for time lost." Pet. App. 12a.

Thereafter, the Court, following a discussion of authorities, arrived at an erroneous assumption:

> "Like the court in *Sweeney, we must assume* that if the Board wanted the amount paid Choate reduced by his sickness benefits and disability annuity, it would have said so in the award." (emphasis supplied) Pet. App. 13a.

The Railroad contended this assumption was wrong because the Board's interpretation specifically excluded Choate's

physical disability status from the record when the Board was requested to interpret the Award in light of Choate's physical disability.[5]

Finally the Court noted the Railroad Retirement Board's "option" to recover funds it has paid him over the years. Pet. App. 14a. The Railroad's response to this suggestion was the outgrowth of a factual and legal contradiction - namely, that back pay is not owed to an employee who cannot or will not work while he is drawing disability pay.

C. The District Court Interprets Rule 55 of the Collective Bargaining Agreement.

Faced with the appellate assumption that the Public Law Board had heard and considered the issue of Choate's sworn physical disability versus his entitlement to back pay, the District Court concluded:

(1) No issue of whether the Railroad owed back pay existed because that had been decided by the Board, therefore,

(2) Only the issue of how much was owed by the Railroad remained.

The District Court made the back pay calculations and again ordered Choate's reinstatement despite the Railroad's urging that the entire Award and interpretation could not be enforced because the impact of Choate's physical disability on his back pay entitlement had never been judged on its merits by any forum — arbitral or judicial.

D. The Second Appeal

The Railroad appealed once more. In the Railroad's view, the District Court's disposition of the case resulted in

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[5]Indeed, the Board's interpretation commented that the disability issue was one of compliance for the Courts and beyond the Board's jurisdiction. Pet. App. 46a.

judicial preemption of the statutory function of the Public Law Board — namely, the interpretation of all pertinent facts bearing upon what the collective bargaining agreement termed ". . . paid for time lost." As the Railroad contended before the District Court and then the Court of Appeals, the proper function of a reviewing judicial tribunal was to remand to the Board with instructions to evaluate all facts and arrive at a dollar amount owed, if any. Further, it was urged in the second appeal that the appellate court should reconsider its earlier erroneous assumption that the Board had considered and resolved the issue of Choate's disability. The Union argued that the doctrine of "Law of the Case" foreclosed further review by the Court and that a summary affirmance was appropriate.

E. The Second Appellate Decision

Following oral argument in May, 1984, the Court rendered its order affirming the District Court's order. Pet. App. 5a. From the Railroad's perspective, the opinion made three interesting observations:

(1) First the Court noted that the Board ignored the disability issue:

> "The board declined to consider the effect of Choate's receiving disability payments because this evidence was not part of the record at the first hearing." Pet. App. 3a.

(2) Then the Court recognized it could have corrected a "plain error" in the first appeal if one had been committed.

(3) Lastly, commenting upon the first panel's erroneous assumption that the Board had considered the disability payments to Choate, the Court speculated that:

> "The majority might have meant that although

> L&N informed the board of Choate's disability claims before the board issued its interpretation, the board's refusal to modify its award indicates that it did not consider this evidence relevant to Choate's claim against L&N." Pet. App. 5a.

The plain fact was that the Board erroneously believed it lacked jurisdiction of the question.

The Railroad then filed a petition for rehearing and suggestion for rehearing *en banc,* because it wanted to stress the legal significance in the judicial review process of the Board "declining to consider" the disability issue as distinguished from the appellate court assuming the Board "did not consider this evidence relevant."

On September 21, 1984 the Railroad petition and suggestion were denied. Pet. App. 35a.

ARGUMENT

This case demonstrates the reluctance of the Courts below to permit the Railway Labor Act's mandatory grievance procedures to completely fulfill their role. The clear result is the District Court below exercising authority and applying expertise that historically the judiciary ascribes to the Public Law Boards. The Railroad submits the results constitute judicial usurpation of the arbitral process and violates the mandate of the Railway Labor Act requiring arbitration of disputes.

I. The Courts Below Should Have Remanded This Case to the Public Law Board For Its Final and Binding Determination of The Disputed Physical Disability Issues.[6]

A. The Courts should have instructed the Board to

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[6]See *Transportation-Communication Employees Union v. Union Pacific RR Co.,* 385 U.S. 757 (1966), reh. den., 385 U.S. 1032 (1967) for remand authority, more particularly note 4, p. 166.

determine whether Choate's physical disability barred a back pay award.

The Court of Appeals, in its second opinion, recognized "the Board *declined to consider* the effect of Choate's receiving disability payments because this evidence was not part of the record at the first hearing."[7] Then the Court speculated that the prior panel majority "might have meant" that the Board "did not consider this evidence relevant." The railroad submits that the *Board's refusal to reopen the hearing record* to even consider Choate's disability cannot be equated to the Court's later suggestion that the Board might not have considered Choate's disabled condition relevant to the back pay issue. Therefore, no final and binding resolution of the issue has been rendered. This dispute has not yet been resolved in the arbitration. With the Board as "Alphonse" and the Court of Appeals as "Gaston," the issue remains unconsidered and unjudged. Surely all of this guesswork and filling in the blanks could be resolved by a one sentence instructive remand to the Board.

In a strikingly similar case, *Hart v. Overseas Nat. Airways, Inc.*, 541 F 2d 386 (3rd Cir., 1976), Plaintiff/pilot Hart had been dismissed for incompetence, but the System Board of Adjustment had set aside his termination. Hart was to be "made whole for any and all wages . . . to which he is or would have been entitled had he not been wrongfully discharged." The issue as to what would make Hart "whole" arose because he had sustained incapacitating injuries in the air crash that precipitated his discharge and had received workmen's compensation benefits. The Court stated at p. 392:

"We thus cannot disagree with the district court that the

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[7]The Railroad contends the Court of Appeals committed "plain error" in its first opinion when it erroneously assumed the Board had considered Choate's disbility — when in truth the Board excluded it from the record before it.

award as to damages was fatally uncertain and therefore incapable of enforcement. If the district court on remand affirms the award as to ONA's liability (see discussion *infra*) then the damage portion of the award must be remanded to the referee for clarification and additional findings [citing authorities]. Unless this procedure is followed, the district court would be preempting the fact finding functions which had been assigned by the parties to the referee, a preemption which is neither sound nor appropriate."

The case of *United Transportation Union v. Southern Pacific Transp. Co.,* 529 F.2d 691 (5th Cir., 1976) involved an award paying "for all time lost" and the Court at p. 693 recognized that the Board was best equipped with its "special expertise" to cope with the Award's ambiguity:

"In the present case, there is no evidence which gives clear indication as to what the board meant when it directed Southern Pacific to compensate Muller for "time lost." Thus, the ambiguity can only be resolved by an examination of the merits of the claim, the collective bargaining agreement, and other matters where the special expertise of the board is desirable."

In this case, there was ambiguity because the Award did not contemplate that Choate was physically disabled from the date of his dismissal. When the Board was asked to resolve the problem, it mistakenly believed it lacked jurisdiction to decide the question.

B. The District Court below has usurped the statutory function of the Board by interpreting the collective bargaining agreement.

The District Court in its various orders in this case has enforced Award No. 1 of Public Law Board 1998 against the

Railroad by ordering the reinstatement of Choate to the position of system signal tester helper, and by itself awarding back pay prior to February 1, 1983, in the sum of $142,306.94, plus $2,387.97 per month from February 1, 1983, until reinstatement, prorated daily, plus prejudgment interest at 9% per annum from January 9, 1979 to July 1, 1982, at 8% from July 1, 1982 to February 18, 1983, plus costs of suit.[8] But it did so on the mandate of the Court of Appeals which wrongly assumed that the Public Law Board rejected the evidence on disability as immaterial to its award, while the Board had acted for jurisdictional reasons. In entering these orders, neither the Court nor the Board considered the critical and material question of whether Choate was physically able to have earned the back pay being granted and what impact his sworn statement of physical disability should have.

While recognizing the District Court may calculate back pay in an enforcement proceeding for an award that is unambiguous and where there is no dispute, the obvious need for a clear interpretation to explain what constitutes compliance with Rule 55 of the collective bargaining agreement exists to this day. An example of a District Court's appropriate reluctance to calculate an award giving "full pay for all time lost" is found in *Monaghan v. Central Vermont Ry.*, 404 F. Supp. 683 (D. Mass., 1975) wherein a remand was ordered. The Court at p. 690, citing and quoting from *Teamsters Local 25 v. Penn Transportation Corp.*, 359 F. Supp 344 (D. Mass. 1973), stated:

> " . . .this district has already recognized the well established principle that ambiguities and uncertainties of labor arbitration awards should not be resolved by the court acting as interpreter. Rather the proper approach is to resubmit the award to its author for clarification."

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[8]In a supplemental order, the Court ordered that interest on back pay shall be computed as daily wages became due and not for the gross back pay award.

In *Hanson v. Chesapeake & Ohio Ry. Co.,* 412 F.2d 631, 634 (4th Cir., 1969), the Court recognized that while the awards of the National Railroad Adjustment Board or a Public Law Board are considered conclusive, they must still be definite enough for courts to ascertain the scope of their terms. The Court stated:

> "We hold, therefore. that it was not beyond the jurisdiction or the competency of the district court to enforce the award by ascertaining the names of the employees in the affected class and translating the Board's measure of damages into dollars and cents. If, however, the district court, after considering the merits of the action, decides that the award is too indefinite to be enforced, it may remand the proceedings to the Board. Remand may be on the court's own initiative or on motion of either party."

It is important to note that the *Hanson* Court referred to the Board's measure of damages in asking if the Board's award was ambiguous or not. The railroad urges remand to the Board is the required method of resolving disputed damages issues. In *Laday v. Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 422 F.2d 1168 (7th Cir., 1970) clarification required two remands. The Court stated at p. 1171:

> "Here the fact that the award had to be remanded twice to the Board for interpretation argues against any contention that the amount of damages was readily determinable at the time the award was made. Only when the Board rendered its second interpretation on January 31, 1069 did the amount of damages awarded the plaintiffs become fixed and determined."

In the instant case, the Board considered itself without authority to determine whether Choate was entitled under Rule 55 of the collective bargaining agreement to be paid as

"time lost" for the period he was physically disabled.
In view of the Board's refusal to reopen its record to consider the effect of Choate's physical disability on the issue of back pay entitlement, the obstructions to final and binding enforceability for the Courts below were:

(1) The award itself never mentions a single rule of the applicable collective bargaining agreement as support for "Claim sustained."

(2) The interpretation adds only the language of Rule 55 that includes the words ". . . paid for time lost."

(3) An absolutely material fact, Choate's physical disability, was not considered by the Board.

The words "paid for time lost" are not difficult to translate into dollars in a typical arbitration award where the employee was off work, wanted to work, and was physically able to work. Choate it is true was off work, but the other two factors are missing — he neither wished to work, having requested leaves of absence, nor was he physically able to work, having sworn otherwise.[9] Thus, the phrase "paid for time lost" as it appears in Rule 55 called for an interpretation by the Board — not the Courts — and remand to the Board is the solution to the enforceability issue.

It is the Railroad's position that the District Court below did not have the authority to enter monetary judgments without

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[9]While no estoppel argument is detailed herein or below, the Courts have a long tradition of applying either collateral estoppel or judicial estoppel where dual though contradictory wage/benefit recoveries have been sought. Here two federal statutes have been so abused, not too dissimilar from the issue in *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir., 1953) wherein the Court stated:

"Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the courts" which has been emphasized as an evil the courts should not tolerate." [citing authority.] "And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."

some direction from the Board on the effect of Choate's disability on the application of Rule 55 having been previously provided by the Public Law Board. It is settled under *United Transp. Union v. Consol. Rail Corp.*, 672 F.2d 621, 625 (7th Cir. 1982) and under the recent decision in *W. R. Grace & Co. v Local 759,* *U.S.* , 76 L.ed. 2d 298 (1983) that the District Court cannot provide its own interpretation of a collective bargaining agreement in order to grant monetary relief.

C. This Award cannot be enforced because it does not comply with the Railway Labor Act.

This Court's discussion of the Railway Labor Act as it pertains to the resolution of disputes arising out of the interpretation of collective bargaining agreements in *Union Pacific R. Co. v. Sheehan,* 439 U.S. 89, 94 (1978) reh. den., 439 U.S. 1135 (1979) summarizes the legislative purpose for very limited judicial review. This Court also reemphasized the teachings of *Gunther v. San Diego & A.E.R. Co.* 382 U.S. 257, 263 (1965) wherein the "three" limited categories of review" are provided in the Act, namely the failure of the Board to comply with the Railway Labor Act, the failure of the Board to confine itself to its jurisdiction or for fraud of the Board. 45 U.S.C. § 153 First (p). It is the first-named exception upon which the Railroad herein relies. Pet. App. 36a.

The Act does have minimum requirements where monetary awards are involved, see 45 U.S.C. § 153 First (0) in pertinent part:

> "In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.". . .

In the instant case, when the Board knew Choate was disabled, but chose to refuse to consider the fact, leaving it to the Courts, the result was an incomplete award. When the Court of Appeals then wrongly assumed the Board had considered the issue when it really had not, the award was still incomplete. Then when the District Court ignored the Railroad's urging to remand to the Board and instead acted upon the Court of Appeal's erroneous assumption, made its own interpretation of how to apply Rule 55 of the collective bargaining agreement by fashioning its monetary award, the duty under the Act was effectively breached.

The efforts of the Courts below to complete the Board's work constitutes overreaching judicial review caused by the failure of the award to meet the minimum threshold standard of enforceability.[10] Thus, it is argued by the Railroad that the Board below had indeed failed to comply with the Railway Labor Act because as this Court stated in *Union Pacific R. Co. v. Sheehan*, supra at p. 94:

> "The effectiveness of the Adjustment Board in fulfilling its task depends on the finality of the determination."

The Railroad urges that the Court's authority to remand the case to the Board for determination of a final and binding award on all issues is now inherent in the judicial review process under the Railway Labor Act. See *Transportation-Communication Employees v. Union Pacific R. Co.*, supra, at p. 166.

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[10]Initially, in its first appeal, the Railroad recognized the Court's authority to determine whether or not the Railroad had complied with the Board's award because Choate had admitted he was disabled. However, instead of finding that the Railroad had complied with the Board's award, the District Court's enforcement order was merely affirmed with no guidance in the remand order on the impact of the claimed disability on the back pay issue.

II. The Court Below Should Not Have Applied the Doctrine of Law of the Case in the Second Appeal Because "Plain Error" Was Committed in the First Appeal.

The Court below held that the doctrine of the law of the case applied and that, "matters decided on appeal are controlling in the second appeal, unless the first panel committed plain error."

Going further, the Court found that plain error had not been committed on the first appeal. "Plain error" is a highly subjective concept variously labeled by the Courts as "highly prejudicial" or "obvious" error to the degree that one's rights are substantially adversely affected. In the words of this Court in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981):

> " 'Plain error' review . . . is suited to correcting obvious instances of injustice or misapplied law."

In support of the Railroad's contention that the Court below erred in applying the law of the case doctrine, it must be recognized that the first District Court decision and appeal were affirmations of a Board Award with which the Railroad had asserted its compliance. Choate had been reinstated and the disciplinary action expunged from the record. The Railroad did not believe Choate had lost any time from work because of the flawed discipline since he was physically disabled during the entire period. It did not offer to give Choate "back pay." In view of Choate's physical disability, the remand to the District Court perpetuated the complete absence of guidance that had also been lacking in the award on the issue of what constituted back pay for time lost.

Then the District Court, after refusing to remand the case to the Board, effectively reopened the award, interpreted Rule 55 to require payment of back pay regardless of Choate's physical condition and entered a monetary judgment — the first monetary award out of five administrative and judicial

determinations. It is this latest District Court decision, now affirmed by the Court of Appeals, that should be immune from applicability of the doctrine of law of the case. The clear distinction between the two appeals is that enforcement under the Railway Labor Act judicial review standards was decided in the first appeal while the second appeal involves the need to remand the case based upon excessive judicial intrusion into Board prerogatives.

In its more recent opinion, the Court below cited *Appleton Electric Co. v. Graves Truck Lines, Inc.*, 635 F. 2d 603 (7th Cir., 1980), cert. den., 451 U.S. 976 (1981) wherein judicial flexibility on the issue is defined at p. 607-608:

> "The 'law of the case' rule is not a limitation on this Court's power to reconsider its prior rulings in a case, . . . Because 'law of the case' is not an immutable rule, we have, on a limited number of occasions reconsidered a previous adjudication where we concluded that our former ruling was clearly erroneous.' [Citations.]
>
> We believe that our prior adjudication disposed of important issues of law that had not been considered by this Court in the past. We therefore reconsider those issues here to correct any uncertainty that may have resulted from our previous ruling."

The refusal of the Court below to apply this reasoning has resulted in an injustice because the judicial review standard has been misapplied to an unenforceable award.

This Court's decision in *United States v. United States Smelting R. & M. Co.*, 339 U.S. 186 (1950), reh. den., 339 U.S. 972 (1950) has factual similarities to the instant case on the issue of applicability of the law of the case. A three judge District Court held certain Interstate Commerce Commission orders were unsupported by the evidence and remanded the matter to the Commission. No appeal was taken to the remand

decision and, thereafter, the Commission, without taking any additional evidence, reissued its cease and desist orders (relative to line-haul service) against the railroads. Again, the District Court found the Commission orders unlawful, but this time the issue was appealed to the Supreme Court. In support of affirmance, the appellees argued that the law of the case applied. This Court explained why the doctrine was not applicable at p. 198-99.

> "The rule of the law of the case is a rule of practice, based upon sound policy that *when an issue is once litigated and decided,* that should be the end of the matter. [Citing Authorities] It is not applicable here because when the case was first remanded, nothing was finally decided . The whole proceeding thereafter was in fieri. The Commission had a right on reconsideration to make a new record. [Citing Authorities] When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. [Citing Authorities] The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of res judicata. [Citing Authorities] And although the latter is a uniform rule, the "law of the case" is only a discretionary rule of practice. It is not controlling here." (Emphasis supplied.)

The analogies include a comparison between the Commission's role and that of the Public Law Board, the Court authority to remand, the recognition of administrative expertise, the lack of judicial finality, and ultimately the Court's

discretion to not apply the rule of the law of the case where there had not been an earlier appeal.

Application of the doctrine of law of the case in the present circumstances would avoid a merits determination of the controversy, *i.e.*, whether Choate is entitled to receive back pay while physically disabled. Thereby Choate would be permitted to effect his two completely inconsistent double recoveries under two federal statutes, all with federal court sanction. The Railroad submits that a fundamental premise and prerequisite for a back pay recovery, (as opposed to a punitive or noncompensatory award of money) is the physical ability and desire to work on the part of the employee seeking the award. Neither arbitration boards nor courts should grant or affirm back pay awards to one who has sworn he was physically incapable of working and has been paid appropriate disability benefits.

To this moment, the Courts below in the instant case have not allowed or required the Public Law Board to apply its special expertise to this issue in order to formulate its monetary award, if any. Nor have the Courts below ruled on the merits of the disability issue. The "plain error" is that this failure to remand was based on the erroneous assumption that the Board had considered Choate's disability when in fact it had not.

The petitioner respectfully suggests this case be remanded to the Board by a "summary disposition on the merits" pursuant to Rule 23.1 of the Rules of Supreme Court of the United States.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

SEABOARD SYSTEM RAILROAD, INC.

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December, 1984 ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Messrs. Joseph Guerrieri, Jr. and Clinton J. Miller, III, Highsaw & Mahoney, P.C., Suite 210, 1050 - 17th Street, NW, Washington D.C. 20036 by United States Mail this seventeenth day of December, 1984.

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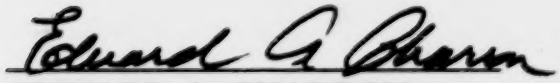

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
(Argued May 22, 1984)

August 23, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. INZER B. WYATT, Senior District Judge*

BROTHERHOOD OF RAILROAD SIGNALMEN,

Plaintiff-Appellee,

No. 83-2486 vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Illinois at Alton, Illinois.

No. 80-5224

William L. Beatty, Judge

*The Honorable Inzer B. Wyatt, Senior Judge of the United States District Court for the Southern District of New York, is sitting by designation.

ORDER

This court has heard an appeal in this dispute once before, see *Brotherhood of Railroad Signalmen* v. *Louisville & Nashville RR*, 688 F.2d 535 (1982). There, the panel affirmed the district court's grant of summary judgment in favor of Plaintiff Brotherhood of Railroad Signalmen (BRS). The district court then awarded money damages to BRS on behalf of BRS member George Choate, and ordered Defendant Louisville & Nashville Railroad (L&N) to restore Choate to his former position with L&N. L&N appeals.

L&N claims that the district court exceeded its jurisdiction in entering the award, that an award of interest was improper, and that this court's first decision rested on an erroneous assumption and thus should be disregarded. BRS argues that the doctrine of law of the case bars L&N's appeal. Our review of the record indicates that L&N's current appeal is based principally on arguments that this court previously decided against L&N. Moreover, the new issues L&N raises in this appeal are unpersuasive. We therefore affirm the district court's order.

The facts surrounding this case are set forth in the district court's Findings of Fact, which are contained in our first opinion. 688 F.2d at 538-42. Briefly, BRS member Choate worked at L&N for thirty-four years until he was fired in August 1976 for missing work without permission. BRS unsuccessfully appealed Choate's dismissal through company channels, claiming that L&N dismissed Choate using unfair procedures. BRS next presented Choate's claim to Public Law Board No. 1998. In January 1978, the board found in favor of Choate and issued an award that simply said "claim sustained." After the board's ruling, L&N discovered that Choate had been receiving disability payments from the Railroad Retirement Board since he was fired. Disagreements between BRS and L&N about what actions the award required L&N to take

prompted BRS to request an interpretation from the board in August 1978. At the same time, L&N asked the board to reconsider its ruling on the ground that Chaote was ineligible for back pay for the time he was receiving disability payments. In November, the board reaffirmed its ruling and directed L&N to comply with Rule 55 of the parties' bargaining agreement. Rule 55 states: "If the charge or charges against an employee are not sustained, his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost." The board declined to consider the effect of Choate's receiving disability payments because this evidence was not part of the record at the first hearing.

L&N restored Choate to his position on the seniority roster and offered him a different job. BRS countered that L&N still had not complied with the board's award, and in December 1979 BRS filed a petition to enforce the board's award in district court. The court granted BRS' motion for summary judgment. The court found that L&N's job offer was a "sham," and held that the award required L&N to restore Choate to his former job and give him back pay. The court also ruled that L&N could not "set-off" its back pay damages by the disability payments Choate had recieved. Instead, the court found that the Railroad Retirement Board might have a right to reimbursement from Chaote.

L&N raised two principal issues in its first appeal: first, whether the district court erred in concluding that L&N had not complied with the board's award, and second, whether the award required L&N to reinstate Choate despite his claimed disability. This court affirmed the district court's judgment and adopted its opinion.

After our ruling, the district court ordered L&N to reinstate Choate to his former position, to pay BRS (on behalf of Choate) $142,306.94 in back pay, to pay interest from January 9, 1979, and to pay BRS's attorney's fees. L&N moved for a new trial and for "reconsideration" of this order, claiming that the district

court lacked jurisdiction to determine a remedy because the board's award was ambiguous, that the appellate panel and the district court both mistakenly assumed that the board had considered the evidence about Choate's disability claims, and that the interest award was improper. The district court modified its interest award, but denied the motion on the ground that "we have heard all of these arguments several times before. On cross-motions for summary judgment this Court considered these matters as did the Seventh Circuit . . . Defendant raises no new matters of substance in his motion for a new trial." L&N raises the same grounds for relief on this appeal.

Under the doctrine of the law of the case, matters decided on appeal are controlling in the second appeal, unless the first panel committed plain error. *See, e.g. Appleton Electric Company* v. *Graves Truck Line, Incorporated,* 635 F.2d 603, 607 -08 (7th Cir. 1980). We agree with the district that the first panel decided most of the issues that L&N now raises. L&N argues that the district court could not properly grant Choate relief because the board's award was ambiguous, and thus the court should have remanded the case to the board for clarification. Yet whether the board's award was ambiguous was precisely the issue that this court determined on the first appeal, where the dispute involved what the award required L&N to do. In his dissent to the panel's opinion, Judge Posner stated that he and the majority "disagree only on the question whether the board's award was unambiguous, but I submit that it is not unambiguous . . . We should instead direct the district court to remand this case to the board for further consideration." 688 F.2d at 547 (Posner, J., dissenting). L&N essentially argues that the majority ruled incorrectly. Absent a showing that the majority committed plain error, however, we are bound by their disposition of this issue.

L&N argues that this court did err by assuming that the board knew about Choate's disability payments, when in reality the board refused to hear this evidence. We find this argument unconvincing. The first panel concluded that "we must assume

that if the Board wanted the amount paid Choate reduced by his sickness benefits and disability annuity, it would have said so in the award." 688 F.2d at 538. The majority might have meant that although L&N informed the board of Choate's disability claims before the board issued its interpretation, the board's refusal to modify its award indicates that it did not consider this evidence relevant to Choate's claim against L&N. Both parties' briefs for the first appeal clearly stated that the board had not known about Choate's disability when it issued the award, and we decline to assume that the first panel ignored these statements. Finally, if L&N were convinced that the first panel erred, L&N could have sought rehearing, rehearing en banc, or even petitioned for a writ of certiorari, instead of allowing the error to stand and urging us to reach a different conclusion now.

L&N finally argues that the district court's interest award was improper. The court awarded interest beginning thirty days after the board issued its award, not for any period before the award. We find that the award was proper.

This order should mark the end of an "already over-extended case." 688 F.2d at 545 (Will, J., concurring). Protracted cases such as this one undermine Congress's attempts to have labor disputes resolved principally by arbitration. The district court's judgment is affirmed.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS SOUTHERN DIVISION

BROTHERHOOD OF RAILROAD SIGNALMEN,

Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a corporation,

Defendant.

Civil Action No. 80-5224

JUDGMENT

This matter came on for consideration on defendant's motion to fix monetary and other relief. The issues having been duly considered as presented in the parties' memoranda, affidavits, and argument held before the Court February 4, 1983, now, therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that Award No. 1 of Public Law Board No. 1998 be, and the same hereby is enforced against defendant Louisville & Nashville Railroad Company;

IT IS FURTHER ORDERED that said defendant forthwith offer reinstatement to claimant) George L. Choate on whose behalf this action was brought the position of System Signal Tester Helper formerly held by him prior to July 16, 1976;

IT IS FURTHER ORDERED that plaintiff Brotherhood of Railroad Signalmen recover (for the benefit of George L. Choate) of defendant the sum of $142,306.94 (plus $2,387.97 per month from February 1, 1983, until reinstatement, prorated daily); plus pre-judgment interest at nine percent (9%) per annum from January 9, 1979, to July 1, 1982, and at eight percent (8%) per annum thereafter to the date of this judgment; postjudgment interest at eight percent (8%) per annum on the amount of this judgment and costs of this suit. The question of attorneys fees is reserved.

DATED: This 18th day of February, A.D. 1983.

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES

BROTHERHOOD OF RAILROAD SIGNALMEN
Plaintiff-Appellee

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, a Corporation,
Defendant-Appellant

No. 81-1697

United States Court of Appeals,
Seventh Circuit.

Argued Jan.12, 1982

Decided Sept. 16, 1982

Railroad appealed from summary judgment entered by the United States District Court for the Southern District of Illinois, William L. Beatty, J., enforcing award of Public Law Board in favor of union on behalf of dismissed railroad employee. The Court of Appeals, Harlington Wood, Jr., Circuit Judge, held that award which gave employee his "time lost" as result of wrongful dismissal without deducting other compensation received by him through his efforts to diminish or minimize damages suffered by reason of his dismissal was properly enforced.

Order affirmed.

Will, Senior District Judge, sitting by designation, filed concurring opinion.

Posner, Circuit Judge, filed dissenting opinion.

1. Labor Relations 479

Order of Public Law Board may be set aside only if Board failed to comply with requirements of Railway Labor Act, failed to confine order or itself to matters properly within scope of its jurisdiction, or for fraud or corruption by members of division making order. Railway Labor Act, § 3, subd. 1(p), 45 U.S.C.A. § 153 subd. 1(p).

2. Labor Relations 478

Award which gave railroad employee his "time lost" as result of wrongful dismissal without deducting other compensation received by him through his efforts to diminish or minimize damages suffered by reason of his dismissal was properly enforced. Railway Labor Act § 3, subd. 1(p), 45 U.S.C.A. § 153, subd. 1(p).

3. Social Security and Public Welfare 173

Upon proper notice, Railroad Retirement Board would have lien upon judgment enforcing award which gave railroad employee "time lost" as result of wrongful dismissal without deducting other compensation received by him through his efforts to diminish or minimize damages suffered by reason of dismissal to extent of amount Board was entitled by way of reimbursement for sickness benefits and disability payments to employee. Railroad Unemplyment Insurance Act, § 12(*o*), 45 U.S.C.A. § 362(*o*); Railroad Retirement Act of 1974, § 10(a), 45 U.S.C.A. § 231i(a).

4. Labor Relations 478

Where there was no allegation that Public Law Board had failed to comply with requirements of relevant provisions of Railway Labor Act, that Board had exceeded scope of its jurisdiction, or that any member of Board was guilty of fraud or corruption, Board's award sustaining union's challenge to dismissal of railroad employee on ground of unfairness and

impropriety in hearing officer's conduct of investigation and hearing with respect to employee's dismissal in his refusal to allow employee to explain his absence or to present evidence in mitigation had to be enforced and railroad ordered to comply therewith. Railway Labor Act, §§ 1 et seq., 3, subds. 1(p), 2, 45 U.S.C.A. §§ 151 et seq., 153, subds. 1(p), 2.

5. Labor Relations 464

In order for there to be compliance with award sustaining union's challenge to railroad employee's dismissal on ground of unfairness and impropriety in hearing officer's conduct and investigation of hearing in his refusal to allow employee to explain his absence or to present evidence in mitigation, employee had to be restored to job and given back pay; restoration to seniority status was not enough. Railway Labor Act, §§ 1 et seq., subds. 1(p), 2, 45 U.S.C.A. §§ 151 et seq., 153 subds. 1(p).

6. Labor Relations 464

Railroad was not entitled to "set off" against back wages award to employee as result of wrongful dismissal for amounts paid employee in interim by Railroad Retirement Board under Railroad Unemployment Insurance Act and Railroad Retirement Act. Railroad Labor Act, § 3, subds. 1(p), 2, 45 U.S.C.A. § 152, subds. 1(p), 2; Railroad Unemployment Insurance Act, §§ *1 et seq., 12(o)*, 45 U.S.C.A. §§ 351 et seq., 362(*o*); Railroad Retirement Act of 1974, §§ *1 et seq., 10(a), 45 U.S.C.A.* §§ 231 et seq., 231i(a).

James C. Cook, Walker & Williams, P.C., Belleville, Ill., for defendant-appellant.

Clinton J. Miller, Highsaw & MaHoney, P.C., Joseph Guerriere, Jr., Washington, D.C., for plaintiff-appellee.

Before WOOD and POSNER, Circuit Judges, and WILL,* Senior District Judge.

HARLINGTON WOOD, Jr., Circuit Judge.

The Louisville & Nashville Railroad Company (the "Railroad") appeals from the United States District Court for the Southern District of Illinois. The district court entered summary judgment, enforcing an award of Public Law Board No. 1998 (the "Board"), in favor of the Brotherhood of Railroad Signalmen (the "Brotherhood"), on behalf of railroad employee George L. Choate. After examining the briefs and reviewing the record, and based upon the oral argument before this court, we conclude that the district court, in entering its order, properly analyzed the issues raised in this appeal. Therefore, we affirm the district court's order and judgment and hereby adopt its opinion entered on April 22, 1981, attached hereto as an appendix. Moreover, we add the following comments, relating in particular to the district court's conclusions of law 543-544.

[1] At the outset, we recognize, as did the district court, that the scope of judicial review in proceedings to enforce an award of the Public Law Board is among the narrowest in the Law. *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970); *see also Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 93, 99 S.Ct. 399, 401, 58 L.Ed.2d 354 (1978) (narrow scope of review applies to both questions of fact and questions of law). The Board's order may be set aside only if the Board failed to comply with the requirements of the Railway Labor Act, failed to confine the order or itself to matters properly within the scope of its jurisdiction, or for fraud or corruption by a member of the division making the order. 45 U.S.C. § 153, First (p).

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* The Honorable Hubert L. Will, Senior District Judge of the Northern District of Illinois is sitting by designation.

We find it anomalous that an employee can claim to be permanently and totally disabled, obtain a certification to that effect, and collect sickness and disability payments, and, at the same time, seek to force his employer to reinstate him to his former position with back pay for time lost. *Cf. Hodges v. Atlantic Coast Line Railroad Co.*, 363 F. 2d 534, 539 (5th Cir. 1966) (court "strongly disapprove[d]" of practice which permitted employee to sue employer claiming permanent and total disability and at same time force employer to reinstate him to former position with back pay for time lost). Moreover, both the Public Law Board Award, as well as the district court's opinion, are somewhat uncertain in that neither specifies what constitutes "time lost." *See, e.g., Monaghan v. Central Vermont Railway, Inc.*, 404 F.Supp. 683 (D.Mass.1975); *Brotherhood of Railroad Signalmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 284 F.Supp. 401 (N.D.Ill.1968). Nonetheless, we recognize that in light of the issues raised by the parties in the district court and the narrow scope of review under the Railway Labor Act, the district court was limited in what it could do. *See, e.g., Denver & R.G.W. Ry. Co. v. Blackett*, 538 F.2d 291, 294 (10th Cir. 1976) (district court had no power to allow set-off where Board had not provided for such allowance(; *cf. United States v. Atlantic Coast Line Railroad*, 237 F.2d 137 (4th Cir. 1956) (whether equity of the railroad should be worked out by subrogation or by way of exoneration was a matter resting in the sound discretion of district judge).

The railroad relies on *Sweeney v. Florida E.C. Ry. Co.*, 389 F.2d 113 (5th Cir. 1968), to support its contention that the district court had the authority to reduce the award by the amount Choate received during the period he was discharged. In *Sweeney*, the employee, for several years prior to his dismissal from the Florida East Coast Railway Co. ("FEC"), divided his working year, spending five months with the Baltimore & Ohio Railroad ("B & O") and the balance of the year with the FEC. When Sweeney was discharged by the FEC, he went to work for the B & O. The Board sustained

Sweeney's wrongful dismissal claim, awarding him compensation for time lost, but the carrier did not pay. In the enforcement action which followed, the district court dismissed the action, holding that the dispute over whether the Board intended that the award be one of gross or net wages lost during the period must be resolved by the parties requesting the Board to interpret the award.

On appeal, the Fifth Circuit noted first that if the Board had intended the amount paid for "time lost" to be diminished by outside wages, it would have specified that in the award. Therefore, the court found that "Sweeney was entitled to the total amount of his 'time lost', without deductions . . . for *other compensation received by him through his efforts to diminish or minimize the damages suffered by reason of his dismissal.*" *Id.* at 116 (emphasis added). In view of the fact, however, that Sweeney had routinely worked for the B & O from June through October of each year and that his work during that period was "through his choice and not on account of his dismissal," the Fifth Circuit diminished the award by the amount Sweeney earned for those five months at the B & O. *Id.* at 116—17.

[2] *Sweeney* is, in fact, quite consistent with the district court's decision in this case. Like the court in *Sweeney,* we must assume that if the Board wanted the amount paid Choate reduced by his sickness benefits and disability annuity, it would have said so in the award. Moreover, unlike Sweeney, Choate received the payments not "through his choice," but "on account of his dismissal." Thus, the district court properly enforced the award which gave Choate his "time lost," without deducting "other compensation received by him through his efforts to diminish or minimize the damages suffered by reason of his dismissal."

[3] Finally, as the Brotherhood conceded and the district court recognized, "Choate may ultimately be responsible for

reimbursement to the Railroad Retirement Board at some point in the future." After the Railroad complies with the terms of the award, the Retirement Board will have the option of seeking recovery from Choate for the sums it has paid him over the years. 45 U.S.C. §§ 231i(a), 362(*o*). Upon proper notice, the Retirement Board "shall have a lien" upon the judgment "to the extent of the amount [it] is entitled by way of reimbursement." 45 U.S.C. § 362(*o*); *Atlantic Coast Line Railroad Co.*, 237 F.2d at 140; *United States v. Luquire Funeral Chapel*, 199 F.2d 429 (5th Cir. 1952).

The order of the district court is affirmed.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NO. 80-5224

BROTHERHOOD OF RAILROAD SIGNALMEN,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY

Respondent

Before the Court are motions of petitioner Brotherhood of Railroad Signalmen (BRS) and of respondent Louisville and Nashville Railroad Company (L&N) for summary judgment. The instant action was brought pursuant to 45 U.S.C. Section 153, First (p) and Section 153, second, as a petition to enforce Award No. 1, Case No. 1 of Public Law Board No. 1998, dated January 24, 1978, sustaining the claim of the BRS against respondent L&N. Both parties presented oral arguments on their motions and stipulated in open court that the Court should render judgment on the record without submission of the case to a jury.

FINDINGS OF FACT

1. Petitioner Brotherhood of Railroad Signalmen (hereinafter

referred to as "BRS") is the duly authorized representative for the purpose of the Railway Labor Act (45 U.S.C. Section 151 *et seq.*.) of the employees of the respondent Louisville and Nashville Railroad Company (hereinafter referred to as "L&N") in the positions of Signal Tester, Foreman, Assistant Foreman, Signal Technician, Leading Signalman, Leading Signal Maintainer, Assistant Signal Maintainer and Signal Helper and is a party to collective-bargaining agreements executed pursuant to that statute governing rates of pay, rules and working conditions of those employees. The BRS main office is located at 601 West Golf Road in Mount Prospect, Illinois. (*See* Complaint of BRS at paragraph 4, Answer of L&N at paragraph 2).

2. Respondent L&N is a Kentucky corporation engaged in interstate transportation by rail pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C. Section 1 *et seq.* and is subject to the provisions of the Railway Labor Act, 45 U.S.C. Section 151 *et seq.* Respondent maintains its main offices at 908 West Broadway, Louisville, Kentucky, and operates through the Southern District of Illinois. (*See* Complaint of BRS at paragraph 5; Answer of L&N at paragraph 2.)

3. BRS and the L&N are parties to a collective-bargaining agreement with an effective date of February 16, 1949, and parties to several successive supplemental and memorandum agreements. BRS and the L&N are also parties to an agreement dated July 14, 1977, which established Public Law Board No. 1998 pursuant to Section 3, Second of the Railway Labor Act (45 U.S.C. Section 153, Second) to hear and determine disputes between said parties in accordance with the provisions of that Section. This Agreement specified that the Board should have jurisdiction over disputes between the parties listed in Attachment A of the Agreement. A dispute between the parties arising out of the railroad's dismissal from employment of Mr. G. L. Choate, identified as "Dismissal of Mr. G. L. Choate, Signal Tester Helper, following investigation held on July 16,

1976, Carrier file Nos. D-106-67 , G-306-20, G-226-18. Organization Case No. 4921" is such a dispute listed in such attachment A. (A true and correct copy of the July 14, 1977 Agreement and Attachment A thereto is attached to the Complaint of BRS as Exhibit B.) (*See* Complaint of BRS at paragraph 6; Answer of L&N at paragraph 2.)

4. G. L. Choate has been employed by respondent L&N for thirty-four years. He began service as a signal helper with the L&N on April 9, 1945, established seniority as an assistant signalman on March 24, 1948, and established seniority as a signalman on April 11, 1949. (*See* Complaint of BRS at paragraph 7; Answer of L&N at paragraph 2.)

5. Prior to July 16, 1976, Mr. Choate was working on the L&N as a System Signal Tester Helper. He had been previously diagnosed as suffering from Meniere's Syndrome, an ear disorder which affects his sense of balance and which makes it impossible for him to hold any position that entails pole climbing or any other duty that requires balancing. (*See* Complaint of BRS at paragraph 7); Answer of L&N at paragraph 2; Deposition of George L. Choate, December 29, 1980, at. P. 29 (hereinafter referred to as "Tr. 29.")

6. In addition to the regular rate of pay for the position of Signal System Tester Helper provided for in the BRS-L&N collective-bargaining agreement, Appendix DD of the Memorandum of Agreement between BRS and L&N of September 6, 1974, provided for the payment of $3.10 per day as a travel allowance to employees in the Signal Department occupying certain positions, of which Mr. Choate's was one. This $3.10 per day was intended to be a flat rate reimbursement for employees off-the-job expenses, and was in addition to any other authorized expenses for lodging, meals or equipment necessary to perform the required tasks. (Tr. 16—18).

7. On July 16, 1976, the L&N held two consecutive discipline investigation hearings into its charges that Mr. Choate failed or refused to protect his assignment on June 21, 22, 29 and 30,

1979 and was absent from duty without proper authority on those days. The investigations were conducted by H. L. Hood, the L&N's Signal Engineer, Maintenance and Construction. (*See* Complaint of BRS at paragraph 10; Answer of L&N at paragraph 5; Tr. 23—24.)

8. By letter dated August 10, 1976, H.L.Hood notified Mr. Choate that he had been found guilty of the charges brought against him, and that the penalty to be assessed was dismissal from service. (*See* Complaint of BRS at paragraph 10; Answer of L&N at paragraph 5; Tr. 24.)

9. Pursuant to the application provisions of the collective-bargaining agreement and Section 3, First (i) of the Railway Labor Act (45 U.S.C. Section 151, First (i)) Mr. R. B. Flowers, the BRS representative acting on behalf of Mr. Choate, appealed the decision of H. L. Hood up to and including the highest officer of the L&N designated to entertain and act upon such appeals, Mr. W. C. Moore, the L&N Assistant Vice President-Personnel and Labor Relations. In its appeals of the decision, the BRS contended that Mr. Hood's decision and the subsequent dismissal of Mr. Choate were invalid due to the unfairness of the proceedings as conducted by Mr. Hood. By letter dated October 1, 1976, W. C. Moore denied the appeal. (*See* Complaint of BRS at paragraphs 11 and 12; Answer of L&N at paragraph 5.)

10. Following conferences between representatives of the BRS and the L&N held on November 19, 1976, and December 13, 1976, the L&N offered to restore Mr. Choate to service on a leniency basis, restoring his former seniority but without pay for the time lost due to his dismissal. This offer was conditioned upon Mr. Choate's ability to satisfactorily pass a physical examination. By letter dated January 24, 1977, R.B. Flowers advised the L&N that the BRS refused to accept the offer of Mr. Choate's reinstatement on a leniency basis because Rule 55(a)(3) of the collective-bargaining agreement required that Mr. Choate be reinstated with all rights unim-

paired and with pay for all time lost due to the invalidity of the dismissal decision. (*See* Complaint of BRS at paragraph 12; Answer of L&N at paragraph 5.)

11. Rule 55(a)(3) of the BRS—L&N collective-bargaining agreement provides as follows:

> "If the charge or charges against the employee are not sustained, his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost."

(*See* Complaint of BRS at paragraph 12; Answer of L&N at paragraph 5.)

12. Following the L&N's refusal to change its position with respect to Mr. Choate's dismissal, the BRS presented his claim to Public Law Board No. 1998. (*See* Complaint of BRS at paragraph 13; Answer of L&N at paragraph 5, Tr. 25—26).

13. On January 24, 1978, Neutral Member I.M. Lieberman issued the Award No. 1 of Public Law Board No. 1998. That Award sustained the claim of the BRS on behald of Mr. G.L. Choate. The Board sustained BRS's allegations of unfairness and impropriety in the hearing officer's conduct of the investigation and hearing in his refusal to allow Mr. Choate to explain his absence or to present evidence in litigation. (*See* Complaint of BRS at paragraph 14—15; Answer of L&N at paragraph 5; Tr. 26—27); Award No. 1, Case No. 1, Pub.L.Bd.No. 1998, a copy of which is attached to the complaint as Appendix A, Exhibit 1, at pp. 3—6 (hereinafter referred to as "Award No. 1".)

14. Award No. 1 included an Order that the L&N comply with the Award, i.e., thirty (30) days from the date of the Award of January 24, 1978. (*See* Complaint of BRS at paragraph 18; Answer of L&N at paragraph 8; Award No. 1 at paragraph 6.)

15. The L&N did not comply with the terms of Award No. 1 by the thirty-first (31) day after it was issued. On that date, February 24, 1978, BRS General Chairman R. B. Flowers

requested by letter that the L&N advise BRS when it would honor the provisions of Award No. 1, Case No. 1 of Public Law Board No. 1998. Mr. Flowers' letter reminded the L&N that Rule 55(a)(3) states that:

> "If the charge or charges against an employee are not sustained his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost."

(*See* Complaint of BRS at paragraph 19; Answer of L&N at paragraph 8.)

16. In a letter dated March 23, 1978, J. P. Powell, the L&N Superintendent-Signals ordered Mr. Choate to report to Signal Tester R. E. Harvill at Dickson, Tennessee, several hundred miles from Mr. Choate's home in Belleville, Illinois on Tuesday, March 28, 1978. (*See* Complaint of BRS at paragraph 20; Answer of L&N at paragraph 8.)

17. On March 27, 1978, Mr. Choate received a telephone call from Mr. Powell's office informing him that it would be futile for him to make the journey to Dickson, Tennessee because the position for which he was being ordered to report was in reality unavailable to him. Although the telephone call was placed to Mr. Choate by Mr. Flowers, this was done at the request of Mr. Powell and in his presence. (*See* Tr. 46—47, 57.)

18. Following the L&N's advice that his return to service would be a useless gesture, in that telephone call from Mr. Powell's office, Mr. Choate requested a six month leave of absence pursuant to Rule 36 of the collective-bargaining agreement, on April 1, 1978. That request was granted on April 7, 1978. By letter dated September 30, 1978, Mr. Choate requested a six month extension of his leave of absence, which was granted on October 5, 1978. (*See* Complaint of BRS at Paragraph 23; Answer of L&N at paragraph 11; Tr. 48.)

19. By letter dated August 30, 1978, BRS requested an interpretation of Award No. 1. In that interpretation, the majority of

the Board indicated that its intent in sustaining the claim of G. L. Choate was that the L&N comply fully with the provisions of Rule 55 with respect to Mr. Choate as the remedy in the dispute. In that interpretation, the Board restated that the pertinent provisions of Rule 55 are as follows:

> If the charge or charges against an employee are not sustained, his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost.

(*See* Interpretation No. 1 of Award No. 1, Case No. 1, a copy of which is attached to the complaint as Appendix C.)

20. On July 16, 1976, the date of the initial hearings which ultimately resulted in his dismissal from service, Mr. Choate was physically qualified to perform the job of System Signal Tester Helper on the L&N. Although he was suffering from Meniere's Syndrome at the time, that only prevented him from performing jobs that involved climbing poles. However, the System Signal Tester Helper position required no pole climbing, and merely required the occupant of the position to accompany the tester to the locations of the signals, to transcribe the tests made by the tester pursuant to the Signal Inspection Act and the requirements of the Federal Railroad Administration, and to forward the results of those tests to the appropriate management personnel. (*See* Tr. 12—13, 29, 55.)

21. Mr. Choate's fitness to return to the System Signal Tester Helper position to which he was entitled under Award No. 1 and Rule 55 of the collective-bargaining agreement was certified by Dr. T. O'Brien of Belleville, Illinois, to whom Mr. Choate had been referred by the L&N following Mr. Choate's fall in the parking lot of the motel at which the July 16 investigative hearings took place. (*See* Tr. 31—32, 57.)

22. Mr. Choate has been receiving Occupational Disability and Annuity payments from the Railroad Retirement Board since 1978. He is suffering from Meniere's Syndrome. He has, however, been found by L&N's physician to be fit to return to

his position as a System Signal Helper Position of which only six positions were available on the L&N system. (*See* Tr. 34, 36-37, 42, 43.)

23. Mr. Choate has not held any other employment since his dismissal from the L&N following the July 16, 1976 hearings, although he has contacted numerous other carriers for the purpose of seeking employment. (*See* Tr. 44—46.)

24. Mr. Choate is not totally disabled at this time. His disability has always been, and continues to be, only with relation to the jobs in the Signal Department as to which he has seniority rights, but which involve climbing poles or performing other similar tasks. (*See* Tr. 43.)

25. As of December 29, 1980, Mr. Choate considered himself to be physically qualified to perform the job of System Signal Tester Helper on the L&N. (*See Tr. 59.)*

26. The L&N has not complied with Award No. 1 by restoring Mr. Choate to a position, with pay for time lost and a restoration of all rights unimpaired. (See Tr. 60.)

27. Under Section 3 of the Railway Labor Act, a United States District Court is empowered to enforce awards of divisions of the National Railroad Adjustment Board, or a Special Adjustment Board (Public Law Board.) Such Awards may be set aside only in three (3) very limited circumstances, specifically enunciated in the Railway Labor Act:

> Failure of the division to comply with the provisions of this chapter, for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. 45 U.S.C. Section 153, First (p).

(*See* Complaint of BRS at paragraph 27; Answer of L&N at paragraph 25.)

28. It is also admitted that Public Law Board No. 1998 has complied with all of the relevant provisions of the statutory chapter referred to in Section 3, First (p) of the Railway Labor Act. (*See* Complaint of BRS at paragraph 28 ; Answer of L&N

at paragraph 15.)

29. It is also admitted that Public Law Board No. 1998 in Award No. 1, Case No. 1, confined itself to matters within its jurisdiction by disposing of certain claims and grievances as listed in Appendix A of the July 14, 1977, agreement. (*See* Complaint of BRS at paragraph 29; Answer of L&N at paragraph 15.)

30. It is admitted that there existed no fraud or corruption by any member of the Board making the Order. (*See* Complaint of BRS at paragraph 30; Answer of L&N at paragraph 15.)

CONCLUSIONS OF LAW

1. Section 3, First (p) and Section 3, Second of the Railway Labor Act (45 U.S.C. Section 153, First (p) and Second) require that this Court enforce the awards of Public Law Boards unless the Board has failed to comply with the requirements of that Act, the Board has exceeded the scope of its jurisdiction, or there has been some fraud or corruption on the part of members of the Board. This Court may set aside Award No. 1 of Public Law Board No. 1998, then, only if one of those three statutory factors is presented.

2. Courts construing these enforcement provisions have repeatedly emphasized the strict limitations on the review powers of the district courts. The United States Court of Appeals for the Fifth Circuit has concluded that the scope of review by Federal District Courts in proceedings to enforce an award of a Public Law Board is among the narrowest in the law. *Diamond v. Terminal Railway Alabama State Docks,* 421 F.2d 228 (5th Cir. 1970.)

3. The United States Supreme Court has recently emphasized that this extremely narrow scope of review applies to both questions of fact and questions of law, in *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89, 99 S.Ct. 399, 58 L.Ed.2d 354 (1978), where the Court stated as follows:

> Characterizing the issue presented as one of law, as the Court of Appeals seemed to do here, does not alter the availability or scope of judicial review: The dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153, First (q) unequivocally states that the 'findings and order of the (Adjustment Board) shall be conclusive on the parties' and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. *See, e.g., Gunther v. San Diego & A.E.R. Co.,* 382 U.S. 257, 263 [86 S.Ct. 368, 371, 15 L.Ed.2d 308] (1965) . . .'"

Id. at 93, 99 S.Ct. at 401.

4. The history of judicial interpretations of dispute resolution, enforcement and review provisions of the Railway Labor Act, is replete with instances of confirmation of the limited role of Courts in the resolution of minor disputes under the Railway Labor Act. *See Andrews v. Louisville and Nashville Railroad Co.,* 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Gunther v. San Diego and Arizona Eastern Ry. Co.,* 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed2d 308 (1965); *Denver and Rio Grande R.R. v. Blackett,* 538 F.2d 291 (10th Cir. 1976).

[4] 5. Inasmuch as there is no allegation that Public Law Board No. 1998 has failed to comply with the requirements of the relevant provisions of the Railway Labor Act, 45 U.S.C. Section 151 *et seq,* that the Board has exceeded the scope of its jurisdiction, or that any member of that Board is guilty of fraud or corruption, Award No. 1 of Public Law Board No. 1998 must now be enforced, and the L&N ordered to comply therewith. 45 U.S.C. Section 153, First (p) and Second. *See Sheehan,* 439 U.S. at 93, 99 S.Ct. at 401; *Gunther,* 382 U.S. at 263—264, 86 S.Ct. at 371—372.

[5] 6. Courts reviewing questions of an employer's compliance with reinstatement or backpay awards have ruled that

such awards require good faith compliance with the terms thereof. *N.L.R.B. v. Interurban Gas Co.*, 354 F.2d 76, 78 (6th Cir. 1965); *Lakeland Bus Lines, Inc. v. N.L.R.B.*, 278 F.2d 888, 892 (3d Cir. 1960). We cannot find that a restoration to seniority status is compliance with Award No. 1. G. L. Choate must be restored to a job and given back pay in order for there to be compliance with the award.

7. The offer of the L&N to reinstate G. L. Choate was a sham offer of reinstatement. Subsequently the L&N attempted to tout that sham as compliance with the terms of a reinstatement plus back pay award. *Brown v. Bridgeport Rolling Mills Company,* 59 L.R.R.M. 2773 (D.C.Conn. 1965).

8. Inasmuch as the L&N has not complied with the terms of Award No. 1 of Public Law Board No. 1998, which was made in compliance with the procedural requirements of the Railway Labor Act, and that there has been no fraud or corruption on the part of any member of the Board, this Court must now order the enforcement of Award No. 1 pursuant to 45 U.S.C. Section 153, First (p), and require the L&N to immediately comply in good faith with the terms thereof. *N.L.R.B. v. Interurban Gas Co.,* 354 F.2d 76, 78 (6th Cir. 1965); *Lakeland Bus Lines, Inc. v. N.L.R.B.,* 278 F.2d 888, 892 (3rd Cir. 1960).

9. As a railroad employee, Mr. Choate was eligible to receive sickness benefits and disability payments from the Railroad Retirement Board pursuant to the Railroad Unemployment Insurance Act, 45 U.S.C. Section 351 *et seq.,* and the Railroad Retirement Act, 45 U.S.C. Section 231 *et seq.* over the past four and one half years.

10. The provisions of the Railroad Retirement Act, 45 U.S.C. Section 231 *et seq,* and the Railroad Unemployment Insurance Act, 45 U.S.C. Section 351 *et seq,* further provide a mechanism whereby the RRB may recover sums of money, or a portion thereof, it has paid to Mr. Choate under those respective statutes. Thus, any repayment made to the RRB must be accomplished in accordance with 45 U.S.C. Section 231 i(a) and

45 U.S.C. Section 362(*o*).

[6] 11. Although Mr. Choate may ultimately be responsible for reimbursement to the RRB at some point in the future, the L&N's assertion as an affirmative defense to this action that Mr. Choate has suffered no time lost due to his receipt of benefits from the RRB, is, in fact, irrelevant to the instant proceeding. Upon the L&N's compliance with the terms of Award No. 1 by paying him for time lost as a result of his wrongful dismissal from service, the RRB and not the carrier, will have the option of seeking recovery from Mr. Choate for the sums paid to him under the respective statutes. The L&N is not entitled to a "set-off" in the back wages award for the amounts thus paid. *United States v. Atlantic Coast Line RR Co.*, 237 F.2d 137 (4th Cir. 1956).

12. In view of the above-cited provisions allowing recovery of funds by the RRB and which make no provision for a "set-off" by the carrier, and of the award enforcement provisions of Section 3, First (p) and Second, the L&N must now be ordered to comply with the terms of Award No. 1 by restoring Mr. Choate to his former position, with all rights and benefits unimpaired and paid for time lost under Rule 55 of the BRS—L&N collective-bargaining agreement.

Accordingly, it is hereby ordered that L&N comply with Award No. 1, Case No. 1 of Public Law Board No. 1998 as stated above and plaintiff's motion for summary judgment is hereby granted.

IT IS SO ORDERED.

DATED: This 22nd day of April, A.D. 1981.

/s/ W. L. BEATTY

UNITED STATES DISTRICT JUDGE

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

WILL, Senior District Judge, concurring.

I join in the affirmance of the district court's order on the ground that the defendant-appellant, Louisville and Nashville

Railroad Company (L&N), has presented no ground on which either the district court or we may properly set aside the special adjustment board's finding that the claim of the Brotherhood of Railroad Signalmen (BRS) on behalf of G. L. Choate (Choate), one of its members, was sustained. Nor does Judge Posner in his opinion suggest that the L&N has done so.

The only ground suggested as a basis for remanding the case to the district court with instructions to remand it to the adjustment board for a second interpretation of its award (L&N having previously requested and received an interpretation), is that the first interpretation is ambiguous as to whether or not the amount to be paid Choate by the L&N should be reduced by any amounts which he received from the Railroad Retirement Board (RRB) as disability payments during the period covered by the award. Although the first interpretation is not a model of clarity, upon a careful reading of the record, I find little or no ambiguity.

The special adjustment board has twice stated that the BRS claim of improper dismissal was sustained. That claim sought relief under Rule 55 of the collective bargaining agreement between the parties which provides in pertinent part, "if the charge or charges against an employee are not sustained [as here], his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost."

The board, in its interpretation, stated that "this Board intended that Carrier comply fully with the provisions of Rule 55 with respect to Claimant as the remedy in this dispute."

It seems clear to me that the special adjustment board found that Choate had been improperly dismissed, and that the L&N, under Rule 55, owed Choate reinstatement and compensation from the date of the improper dismissal. That the Board so concluded seems obvious from the fact that, although they were advised of Coate's receipt of disability payments during part of the period after his dismissal was sustained and that the

L&N was obligated to "comply fully with Rule 55."

Since the board knew Choate had received disability payments, it follows that the members did not believe the L&N was entitled to deduct the amount of any such payments or they would have said so. That conclusion is in no way negated by the board's statement that matters of compliance are for the courts to decide. Compliance and interpretation are different though related. The BRS has asked the courts to enforce the special adjustment board's conclusions that Choate was improperly dismissed and is entitled to full compliance with Rule 55. That is what Judge Beatty ordered and what affirmance will finally achieve: compliance by the L&N with the board's order.

As I see it, two bottom line conclusions appear. First, the special adjustment board found that under Rule 55, the L&N, having improperly dismissed Choate, is not entitled to have its obligations under the collective bargaining agreement reduced because Choate may have received disability payments, unemployment compensation or other income during the period of his improper discharge. Second, if Choate improperly received disability payments from the RRB, as seems likely, there is a mechanisim for the recovery of such amounts by the RRB but not by the L&N. Under the circumstances, I see no reason to remand this already over-extended case to the district court with instructions that it remand it back to the special adjustment board for yet another interpretation. Accordingly, for the reasons set forth in Judge Wood's and Judge Beatty's opinions, as well as those set forth herein, I join in the affirmance of the district court's order.

POSNER, Circuit Judge, dissenting.

By our decision today we allow a federal district court to cross the boundary line separating its functions under the minor-dispute provisions of the Railway Labor Act from those of a railroad adjustment board, and to decide a question that is

within the board's exclusive competence to decide because it is a question of the meaning of a collective bargaining agreement. The question is whether "time lost" from work by reason of an improper dismissal includes time during which the employee was collecting disability benefits.

Mr. Choate was dismissed by the Louisville and Nashville Railroad alledgedly for failing without good cause to report to work. The Brotherhood of Railroad Signalmen prosecuted a grievance on Choate's behalf and a special adjustment board was convened, pursuant to the collective bargaining agreement, to consider the grievance. The board concluded that the company had failed to sustain the charge on which it had based its dismissal of Choate, and the board ordered the railroad to comply with its award which the order describes simply as "claim sustained."

Rule 55 of the collective bargaining agreement states that "if the charge or charges against an employee are not sustained [as the board had found with respect to Choate], his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost." But a latent ambiguity in the rule as applied to Choate's case, and hence in the board's award, developed when the railroad discovered after the board had issued its order that Choate had applied to the Railroad Retirement Board for disability benefits when he was dismissed, and had been awarded them. The railroad's position was that if Choate was disabled during this period it was not (for him) "time lost" from work within the meaning of rule 55. The railroad therefore asked the special adjustment board to interpret its award, pursuant to section 3 First (m) of the Railway Labor Act, 45 U.S.C. § 153 First (m), which provides that "in case a dispute arises involving an interpretation of the award, the [board] upon request of either party shall interpret the award in light of the dispute."

The board issued an interpretation that did not interpret. It

stated that "the major thrust of the [railroad in asking for an interpretation] is with the question of compliance with the Award. Compliance with an Award . . . is not within the jurisdiction of [the board] but rather rests in the Courts. For this reason, which is beyond question, most of the issues raised by [the railroad] cannot be considered by this Board." The Board did state—or rather repeated—that its award was "claim sustained," and added unhelpfully: "that statement can be clarified only to the extent provided in the applicable [collective bargaining] agreement." The board then quoted rule 55 and commented: "in its sustained Award it was the intention of this Board that Carrier comply fully with Rule 55 insofar as Claimant is concerned . . . In summary, therefore, this Board intended that Carrier comply fully with the provisions of Rule 55 with respect to Claimant as the remedy in this dispute."

When the railroad still refused to pay Choate's back wages for the period when he was receiving disability benefits, the Brotherhood brought this suit, asking that the period during which Choate was receiving disability benefits be included in computing his time lost. The Brotherhood presented evidence to the district court that whatever Choate may have told the Railroad Retirement Board he had not in fact been disabled. The court so found, interpreted the award in the manner urged by the Brotherhood, and ordered the railroad to satisfy the award as so interpreted.

The district court based its decision in favor of the Brotherhood on section 3 First (p) of the Act, which (read together with section 3 Second) provides that the order of a railway adjustment board "may not be set aside except for failure of the [board] to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the [board's] jurisdiction, or for fraud or corruption by a member of the [board] making the order." None of these grounds was made out here. But in basing decision on the absence of any statutory ground for set-

ting aside the board's award the district court overlooked the fact that this is not a proceeding to set aside the award but a proceeding to enforce it: a distinction that is not, at least in the circumstances of this case, a merely technical one. The part of the board's order that is in issue simply directs that Choate be "paid for time lost." No sum of money, or formula for computing a sum of money, is specified. I assume that the order is invulnerable to being set aside by a federal court but that does not tell me what number of dollars and cents Choate is entitled to. The board's award simply states, and its "interpretation" merely repeats, that the railroad has to comply fully with rule 55, that is, has to pay Choate for time lost. The board has never explained what "time lost" means, or replied to the railroad's argument that the term was not intended to include the period during which an employee is receiving disability benefits on the basis of his representation that he is disabled from doing railroad work. The board's statement that compliance matters are within the exclusive jurisdiction of the courts, and therefore that "most of the issues raised by the [railroad] cannot be considered by this Board," suggests the board may have considered the railroad's argument beyond its competence to address.

So while the district court's decision is in form merely a refusal to set aside the board's order, in substance it is a judicial interpretation of rule 55, a provision of the collective bargaining agreement. Relying on a case that stands for the unrelated proposition that the Railroad Retirement Board would be entitled to recover the disability benefits it had paid Choate if he was awarded back pay for the same period from the railroad, *United States v. Atlantic Coast Line R.R.*, 237 F.2d 137 (4th Cir. 1956), the district court held that the railroad was not entitled to set off those benefits against the back pay due under the award. But set-off is not the railroad's argument. Its argument is that Choate should be estopped by his representations to the Railroad Retirement Board to deny that he was disabled and to get back pay for the period of alleged disability. This argument

calls for a construction of rule 55 of the collective bargaining agreement, which is a task for the adjustment board rather than for the district court or this court. The very limited scope of judicial review of board orders reflects, in part at least, a judgment that the board is better at interpreting collective bargaining agreements than the courts are, see, e.g., *Elgin, Joliet & Eastern Ry. v. Burley,* 327 U.S. 661, 664, 66 S.Ct. 721, 722, 90 L.Ed 928 (1946); and it should make no difference (contrary to what the board may have believed) whether the term to be interpreted appears in a substantive or in a remedial section of the agreement.

If the board's order were clear enough to be enforced, the mere fact that it did not actually specify a sum certain to be paid the employee would not be fatal; the court could properly in such a case make the actual computation. See, e.g., *Sweeney v. Florida East Coast Ry.,* 389 F.2d 113, 115—16 (5th Cir. 1968). But where reduction to a sum certain would require interpreting the collective bargaining agreement, as is true in this case, or otherwise trenching on the area of the board's special competence, the only thing the district can properly do is remand the case to the board to carry out its duty under section 3 First (m) to interpret its award. The fact that the board has this express statutory duty is additional evidence that the court was not intended to interpret these awards itself.

I imagine that my brethren agree with my statement of principles and disagree only on the question whether the board's order was unambiguous, but I submit that it is not unambiguous, so that this court's decision, though it in form merely enforces the board's order, in reality interprets the term "time lost" in the collective bargaining agreement; and that is beyond our power to do.

We should instead direct the district court to remand this case to the board for further interpretation—provided, of course, that the district court has the power to remand. The only express such power is conferred in section 3 First (q), which relates to proceedings to challenge, rather than as in this

case to enforce, board orders. But there is abundant authority that the court has the power to remand in enforcement proceedings as well. See, e.g., *Transportation-Communication Employees Union v. Union Pac. R.R.*, 385 U.S. 157, 165 n.4, 87 S.Ct. 369, 373 n.4, 17 L.Ed.2d 264 (1966); *Laday v. Chicago, Milwaukee, St. Paul & P.R.R.*, 422 F.2d 1168, 1170 n.2 (7th Cir. 1970). The power can be rationalized by pointing out that when the defendant in an enforcement action complains that the award is ambiguous, he is in effect seeking review under section 3 First (q), thus invoking the district court's power to remand. See *Brotherhood of Railroad Signalmen v. Chicago, Milwaukee, St. Paul & P.R.R.*, 284 F.Supp 401, 407 (N.D.Ill.1968). There is a problem with this approach: section 3 Second, governing proceedings of special adjustment boards, purports to incorporate only those provisions of section 3 First that relate to "enforcement of compliance," and First (q) as I said is not one of those provisions. But the power to remand in actions to enforce awards of special adjustment boards is too well settled to be seriously questioned at this late date; and it indicates the proper disposition of a case such as this where the award is too ambiguous to enforce where dispelling the ambiguity requires an interpretation of the collective bargaining agreement, a task within the exclusive jurisdiction of the board. The board failed to interpret the award the first time it was asked to do so; it should be told to try again. CF. *United Transport. Union v. Southern Pac. Transport Co.*, 529 F.2d 691, 693 (5th Cir. 1976). We are not authorized to do its job for it.

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CHICAGO, ILLINOIS 60604

September 21, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. INZER B. WYATT, Senior District Judge*

No. 83-2486

BROTHERHOOD OF RAILROAD SIGNALMEN

Plaintiff-Appellee

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois at Alton, Illinois. No. 80-5224 William L. Beatty, Judge

* The Honorable Inzer B. Wyatt, Senior Judge of the United States District Court for the Southern District of New York, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing **en banc** filed in the above-entitled cause by Defendant-Appellant Louisville & Nashville Railroad Company, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the car-

rier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

PUBLIC LAW BOARD NO. 1998

Award No. 1 - Case No. 1

PARTIES TO DISPUTE

Louisville and Nashville Railroad Company
and
Brotherhood of Railroad Signalmen

STATEMENT OF CLAIM

"Dismissal of Mr. G. L. Choate, Signal Tester Helper, following investigation held on July 16, 1976, Carrier File Nos. D-106567, G-306-20, G-226-18. Organization Case No. 4921."

FINDINGS

Upon the whole record after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter. Claimant herein had been employed by Carrier for over thirty-one years. On June 30, 1976 he received a letter charging him with "failing and/or refusing to protect your assignment on June 21 and June 22, being absent from duty without proper authority." Subsequently on July 2, he received a letter charging him with "failing to protect your assignment on June 29 and 30, being absent from duty without permission of proper authority." An investigation on both of the above charges was held on July 16, 1976 following which Claimant was found guilty as charged. He was dismissed from the service.

In the course of the investigatory hearing, Carrier introduce evidence to the effect that Claimant had violated General Rule

P of the Rules and Instructions of the Maintenance of Way Department, reading as follows:

> "Employees are prohibited from engaging in other business, absenting themselves from duty, engaging a substitute to perform their duties, or exchanging duties with others, without proper authority."

Carrier concluded from the evidence adduced in the investigation, (Claimant admitted that he was absent on days in question) that he violated the rule quoted above and that his dismissal was fully justified. Carrier argues that the hearing was fairly conducted and that claimant was given every opportunity to defend his position against the alleged infractions.

Petitioner, while admitting that Claimant did not cover his assignment on the four dates cited in the charges, claimed that there were mitigating circumstances to account for his absence. It is alleged that he did not receive his expense checks from Carrier when he should have according to the Agreement and therefore was absent from his work for that reason only. Petitioner charges that the conclusion of Carrier, with respect to the guilt of Claimant, was inappropriate and furthermore, the punishment accorded him was extremely harsh and unjustified. More significantly, the Organization alleges that Claimant was not afforded a fair trial. It is claimed that the Carrier's officer conducting the hearing suppressed evidence and did not permit Claimant to develop his defense. A whole host of procedural irregularities were cited.

Before consideration of the merits, it is apparent that the threshold issue of procedure must be resolved. Comments will be made with respect to the two most significant areas of concern expressed by Petitioner concerning the manner in which the hearing was conducted.

Prior to the opening of the hearing, the Claimant requested that certain officials, as well as other employees be made available as witnesses at the hearing. Included in the group of witnesses was Mr. H. L. Hood, Signal Engineer. At the outset

of the hearing, Mr. Hood appeared as the conducting officer of the investigation. The representative of Claimant indicated that he had been called as a witness and wished him to appear as a witness in the investigation. Mr. Hood replied to the effect that he was the conducting officer of the investigation and would not be permitted to testify as a witness. He added, however, that there were other witnesses from the Signal Department who would testify and who had as much knowledge of the charges as he did. It must be noted that the hearing officer was clearly in error. There is no question but that he could indeed have testified at the hearing, was present and available to do so, but chose to refuse to do so based on the fact that he was the investigating officer. There is ample precedent to support the Organization's contention that the hearing officer can and should indeed upon being called, testify as a witness for the defense. It is well established that when a hearing officer does testify under such circumstances, the Petitioner is precluded from later alleging that he acted in a multiple capacity and thus, impaired the process of the investigation. Thus, there is no reason why the hearing officer could not have testified and not relinquish his role as the investigating officer.

Of greatest concern is the allegation that Claimant was impaired in his defense by the rulings of the hearing officer. It is apparent, from an examination of the exhibits admitted in evidence at the hearing, that Claimant based his defense solely on the mitigating circumstance of failure to receive his expense checks from Carrier in timely fashion. From the very inception of the questioning of witnesses at the hearing, the hearing officer did not permit any questions whatever by Claimant or his representative of any witness with respect to this defense. In fact, the first witness, Mr. Powell, the Superintendent of Signals, was questioned with respect to Mr. Choate's absence and following that questioning, when under cross examination he was asked whether Mr. Choate had any reason, in a telephone conversation, for not fulfilling his obligations and reporting for work. The witness responded that Mr. Choate had

not received his expense account and he would not continue on his job. Upon following up on that question, the hearing officer objected and stated as follows: "Mr. Flowers, this investigation is being conducted to develop the facts from Mr. Choate's failure to protect the service which he was assigned on June 21 and June 22, as directed by Mr. Powell. This is not a hearing on handling a grievance which you and Mr. Choate feel you might have. There are other procedures outlined in your working agreement instructing you in the handling of grievances, it is not felt your question is pertinent to develop the facts of charges." Mr. Flowers properly protested that the question that he asked was not permitted to be answered and that it would prejudice the Organization's position in the defense of Claimant. Shortly thereafter when Mr. Choate participated in the questioning of Mr. Powell, and again was restricted in the questions which he could ask of Mr. Powell; he was told by the hearing officer: "Mr. Choate, when you are put on the stand, you certainly will have an opportunity to inject your statement into this investigation." However, it is interesting to note that he was also precluded from asking questions with respect to his past record on Carrier for the same reason in that it was stated by the hearing officer as follows: "Mr. Choate, your past few questions pertaining to your record in the past twenty-eight years has nothing to do with the charges of your failing and refusing to protect your assignment on June 21 and June 22, 1976. Do you have further questions pertaining to the charges. We will not enter any further questions into this investigation unless they are pertaining to the charges and Mr. Flowers and Mr. Choate, do you desire once again to read the charges."

Subsequently, in the investigation, Mr. Choate, as a witness, was asked to give an opening statement. He presented his statement, which was relatively short, which was followed by the following comment from the hearing officer: "Mr. Choate, this investigation is not being held to handle your grievance. You are charged with failing and/or refusing to protect your assignment on June 21 and June 22, 1976, being absent from

duty without permission of proper authority. As has been pointed before there are procedures in the Signalman's Agreement for handling a grievance. Will you please confine your statement to the charges as stated to you." Upon being challenged again by the Claimant's representative, Mr. Hood indicated that Mr. Choate was permitted to give any statement he wished on why he absented himself from duty without permission of proper authority on June 21 and June 22, but indicated, of course, that that was all he would be permitted to say by implication. The record is replete with instances of the hearing officer refusing to permit any questions whatever by either Mr. Choate or his representative concerning the reasons he alleged for his absence.

An examination of the entire transcript of the two investigations which ran consecutively indicates clearly that the hearing officer assumed the role of prosecutor and was playing the part of a Perry Mason. However, even in that role, he went beyond the pale of proper rulings of evidence. The best analogy would be that of a man tried for running his car into a lamp post but being precluded from raising or introducing any facts concerning the physical condition of his car at any time prior to the moment of impact. Similarly in this situation while it is clear and undenied that Claimant was absent from work on the four days in question, the alleged reason for such absence was never permitted to be introduced into evidence and obviously was never evaluated by the hearing officer since he precluded any testimony concerning such rationale.

While we may have serious question about the propriety of Claimant's actions in refusing to go to work based on the expense check problems he was having, there is insufficient material in the record to even evaluate that defense due to the hearing officer's rulings. From the record, for example, it is impossible to know whether indeed there was discrimination with respect to Claimant as compared to other employees in a similar position in the Signal Department. It is also interesting to note that not only did the hearing officer refuse to permit the in-

troduction of material with respect to the reasons for Claimant's absence, but furthermore would not permit the introduction of favorable information concerning Claimant's past record with Carrier. Such information is regularly introduced into the record and properly so by Carriers in determining the measure of discipline to be imposed. It was certainly erroneous on the part of the hearing officer to preclude Claimant from doing so in this case.

Boards in this industry have ruled on numerous occasions that disciplinary hearings such as that involved herein are not and can not be conducted within the restrictive limitations of the rules of evidence or procedures found in courts of law. In fact, in this industry the conduct of such hearings must be exemplary since they are conducted by an individual who might be considered partisan. As has been said before (Third Division Award No. 20014) "Such hearings must be conducted in such a manner that the conduct of the hearing officer is unimpeachably objective and unbiased in the development of facts." Further, as stated in the Third Division Award No. 18963, "It is important that a Claimant be entitled to develop testimony which may have been pertinent to the case in order to ensure that the Claimant receives a fair and impartial hearing. This is also important to Carrier because by having the testimony developed at the hearing, Carrier is thus in a much better position to evaluate the evidence and to assist it in properly assessing any warranted disciplinary action." In the case before us, it is evident that in addition to refusing to testify, the hearing officer unduly restricted Claimant in the presentation of his case and thus jeopardized his defense critically.

From the record before us, it is impossible for the foregoing indicated reasons to determine whether or not Claimant's action justified discipline. Accordingly, the claim will be sustained.

AWARD

Claim sustained.

ORDER

Carrier will comply with the Award herein within thirty (30) days from the date hereof.

/ I. M. Lieberman /
Neutral member

Carrier Member

Employee Member

Date: January 24, 1978
Louisville, Kentucky

PUBLIC LAW BOARD NO. 1998

Award No. 1 - Case No. 1

PARTIES TO DISPUTE

Louisville & Nashville Railroad Company
and
Brotherhood of Railroad Signalmen

STATEMENT OF CLAIM

"Dismissal of Mr. G. L. Choate, Signal Tester Helper, following investigation held on July 16, 1976, Carrier File Nos. D-106567, G-306-20, G-226-18. Organization Case No. 4921."

INTERPRETATION

Petitioner has requested by letter dated August 30, 1978, an interpretation of the Award rendered by the Board in the above matter. Specifically, Petitioner requests that, the Board:" . . . clarify the Carrier's responsibility under the Award."

An examination of the submission presented by the Organization in support of its request for interpretation together with an evaluation of all the arguments presented at the hearing in Louisville on November 6, 1978 makes it apparent that the major thrust of Petitioner is with the question of compliance with the Award. Compliance with an Award and Order of a Public Law Board, such as this, is not within the jurisdiction of such Board but rather rests in the Courts. For this reason, which is beyond question, most of the issues raised by Petitioner cannot be considered by this Board.

The Award of the Board in this case was "claim sustained." That statement can be clarified only to the extent provided in the applicable Agreement. Rule 55 of that Agreement provides

in pertinent part:

> "If the charge or charges against an employee are not sustained, his record shall be cleared of the charge or charges and if suspended or dismissed he shall be reinstated with all rights unimpaired and paid for time lost."

In its sustaining Award it was the intention of this Board that Carrier comply fully with Rule 55 insofar as Claimant is concerned. It should be noted that the status of Claimant during the handling of this claim on the property is not a part of the basic record in this case; the issue of his status was not joined during the handling of the dispute on the property. The record on the property does indicate however, that Claimant did refuse reinstatement on a leniency basis offered to him in December of 1976.

In summary, therefore, this Board intended that Carrier comply fully with the provisions of Rule 55 with respect to Claimant as the remedy in this dispute.

/ I. M. Lieberman /
Neutral Chairman

J. T. Williams /
Carrier Member

/ Melvin B. Frye /
Employee Member

November , 1978
Louisville, Kentucky

PETITIONER:

Seaboard System Railroad, Inc.

Seaboard System Railroad Company is a wholly-owned subsidiary of CSX Corporation. Listed below are companies related to the Petitioner and its parent:

Eastern Hardwoods, Incorporated
James Center Development Company
Mid Allegheny Corporation
New Gauley Coal Corporation
Littleton Fuel Company
The Baltimore and Ohio Railroad
The Baltimore and Philadelphia RR Co.
The Cleveland Terminal & Valley RR Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Chicago So. Sh. and South Bend RR
Monon Coal Company, Inc.
Nashville & Decatur Railroad Company
North Charleston Terminal Company
Fruit Growers Express Company
Richmond-Washington Company
Richmond, Fredericksburg & Potomac Railroad Company